

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

LUCAS HENRY,

Petitioner,

v.

No. 9:01-CV-1361

(GLS/DEP)

THOMAS RICKS,

Respondent.

APPEARANCES:

OF COUNSEL:

FOR THE PETITIONER:

OFFICE OF ROBERT N. ISSEKS
6 North Street
Middletown, New York 10940

ROBERT N. ISSEKS, ESQ.

FOR THE RESPONDENT:

HON. ANDREW CUOMO
Office of the Attorney General
120 Broadway
New York, New York 10271

JODI A. DANZIG
Assistant Attorney General

Gary L. Sharpe
U.S. District Judge

MEMORANDUM-DECISION AND ORDER

By Memorandum-Decision and Order filed August 21, 2007, the
Report-Recommendation issued by Magistrate Judge David E. Peebles

was accepted and adopted in its entirety, and Lucas Henry's petition for *habeas corpus* relief was denied and his petition dismissed. *Dkt. 20*.

Henry has appealed that Order to the United States Court of Appeals for the Second Circuit. *Dkt. 22*. Presently before the Court is Henry's request for a certificate of appealability ("COA"). *Dkt. 23*. Respondent opposes the issuance of a COA. *Dkt. 28*.

Appeals to the Court of Appeals in habeas corpus proceedings are governed by 28 U.S.C. § 2253, which provides in relevant part that:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

28 U.S.C. § 2253. A COA may only be issued "if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This standard is satisfied by "showing that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (quotations and citation omitted).

Henry claims that he is entitled to *habeas corpus* relief from his

conviction and sentence for depraved indifference murder because, in light of the New York Court of Appeals' holdings in *People v. Feingold*, 7 N.Y.3d 288 (2006), *People v. Suarez*, 6 N.Y.3d 202 (2005), and *People v. Payne*, 3 N.Y.3d 266 (2004), the evidence adduced at Henry's trial was insufficient to support a finding that Henry acted with depraved indifference to human life. See *Dkt. 24*, ¶ 3; *Dkt. 16*, p. 7. In support of his application for a COA, Henry argues that although *Feingold*, *Suarez*, and *Payne* were decided after his conviction became final, the holdings of these cases must be applied retroactively. See *Dkt. 24*, ¶ 2. Alternatively, Henry argues that the *Feingold-Suarez-Payne* line of cases, rather than announcing a new rule of law, merely clarified the law in existence at the time of Henry's conviction. Thus, he argues, under the holdings of *Dixon v. Miller*, 293 F.3d 74 (2d Cir. 2002) and *Fiore v. White*, 531 U.S. 225 (2001), his conviction was unconstitutional. See *Dkt. 24*, ¶ 2.

Upon due consideration, the Court finds that Henry has made the showing required for issuance of a COA.

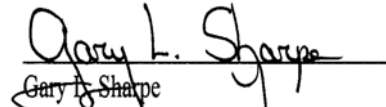
It is therefore

ORDERED that Henry's application for a COA (*Dkt. 23*) is granted in full; and it is further

ORDERED that the Clerk serve a copy of this Order on the parties.

IT IS SO ORDERED.

Albany, New York
November 9, 2007



Gary L. Sharpe
U.S. District Judge